



THE AUSTRALIAN
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Centre for
Aboriginal
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Research

**How does (and should) DSS
treat CDEP participants?
(What are these allegations of
racial discrimination?)**

W. Sanders

No. 149/1997



DISCUSSION PAPER

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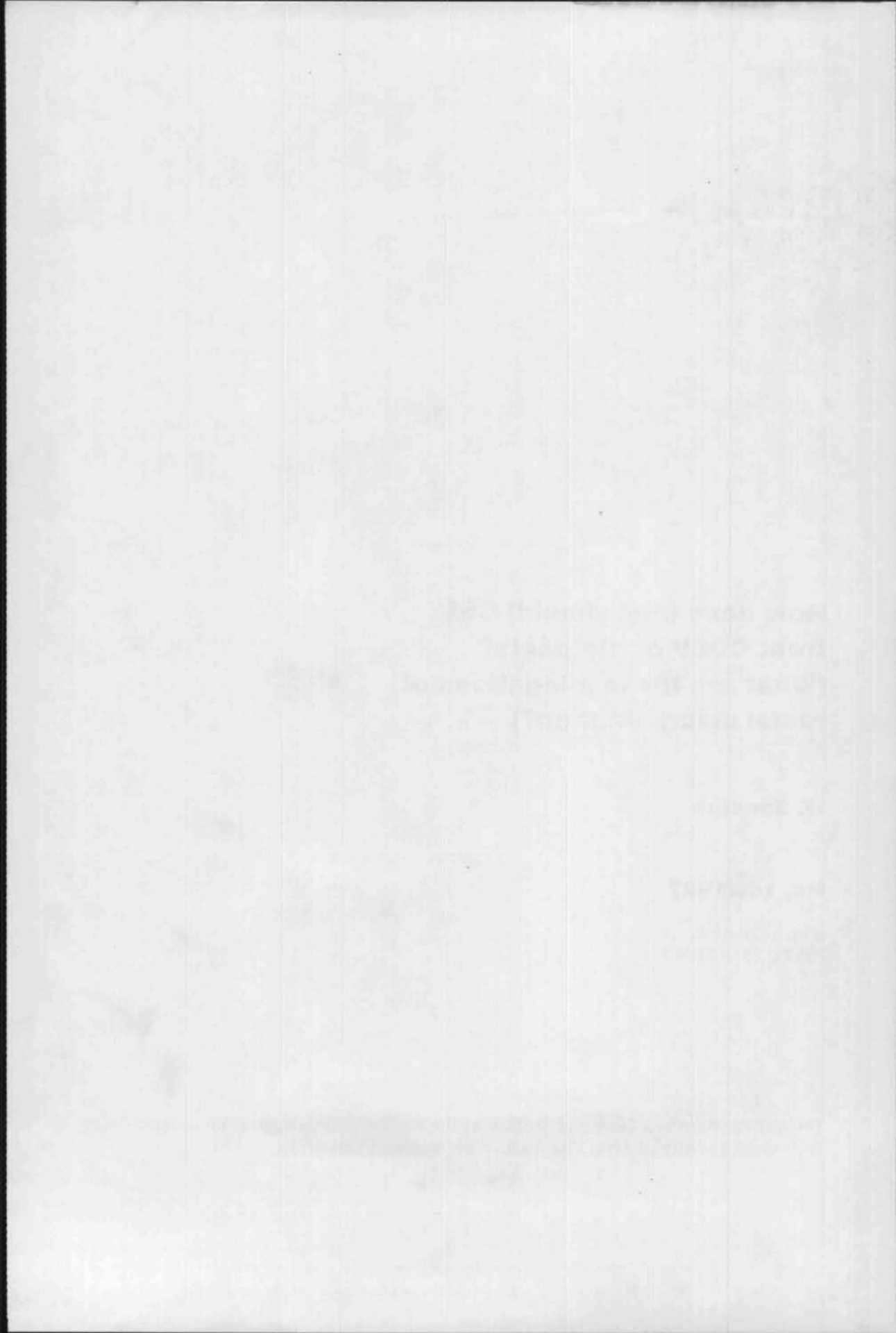
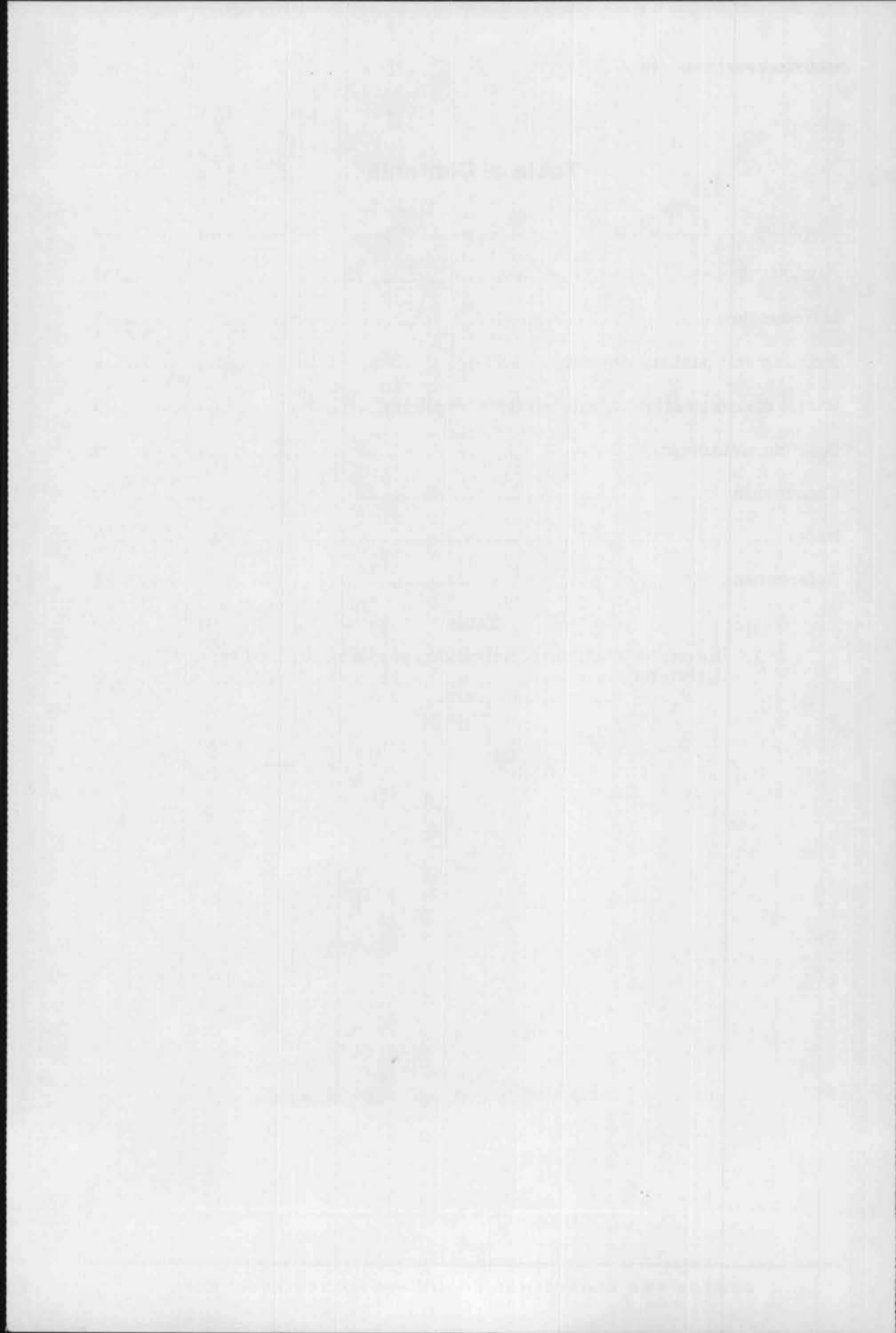


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Summary

- The Department of Social Security (DSS) treats Community Development Employment Projects (CDEP) scheme participants in a unique way, partly as employed low-income wage earners and partly as income-support recipients.
- Treatment as income-support recipients derives from the multiple entitlement exclusion in relation to Newstart Allowance at section 614A of the Social Security Act and from the equivalence between CDEP and various social security payments expressed in CDEP guidelines.
- Treatment as low-income wage earners probably derives from the social security system's highly legislative base and from the fact that CDEP was not, until 1991, alluded to at all in the Social Security Act. It also reflects the fact that CDEP participants do work for wages for indigenous organisations.
- Treatment of CDEP participants as low-income wage earners is sometimes less favourable than their treatment as if they were Newstart Allowance recipients (their direct equivalent). This has sometimes led to allegations of racial discrimination.
- Another reason for allegations of racial discrimination has been the abandonment in recent years of any attempt to identify precise social security entitlement equivalents in the administration of the CDEP scheme. Average per participant rates of payment have been relied upon and this allows perceptions of working for less than one's social security entitlement to flourish and to be difficult to refute.
- Whether DSS's treatment of CDEP participants is racially discriminatory is a technical legal issue, which has not been authoritatively adjudged. Even so, there is a worrying duplicity in DSS's treatment of CDEP participants.
- DSS could resolve this problem by treating CDEP participants entirely as low-income wage earners or entirely as income-support recipients. However, whether either of these courses would be good for the CDEP scheme and in the interests of CDEP participants is open to question.
- In its final section, this paper attempts to foreshadow some consequences for the CDEP scheme of moving in either of these two administrative directions. It suggests that the way to resolve these administrative issues is not yet clear and that the Aboriginal and Torres Strait Islander Commission (ATSIC) needs to take more of an interest in DSS's administrative problems. These two organisations, with very different administrative cultures, need to work together far more on these issues.

Acknowledgments

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Introduction

The Community Development Employment Projects (CDEP) scheme for indigenous Australians is now 20 years old. It is the largest program administered by the Aboriginal and Torres Strait Islander Commission (ATSIC) and has proven very popular with indigenous communities. Despite this size, longevity and popularity, the CDEP scheme still experiences significant administrative problems. So in any discussion of the CDEP scheme, attention needs to be given to micro-level administrative issues as well as more macro-level policy issues. And this is my intention here—particularly in relation to treatment of CDEP participants by the Department of Social Security (DSS).

In recent years complaints have been made by some CDEP participants to the Human Rights and Equal Opportunity Commission claiming that their treatment by DSS, and some other government departments as well, is discriminatory. So how does DSS treat CDEP participants? How should DSS treat CDEP participants? And what are these allegations of racial discrimination? These are the three questions around which this paper is structured, though in the course of the paper they will be elaborated somewhat by adding the odd 'why?' and 'is this justified?'.

Existing and past treatment

How does DSS treat CDEP participants? The answer to this question would seem to be—in a quite unique way, partly as employed, low-income wage earners and partly as income-support recipients.

Let us take the latter part first—the way in which DSS treats CDEP participants as income-support recipients.

There are, in the social security legislation, provisions called 'multiple entitlement exclusions'. These prohibit applicants from qualifying for two types of similar income support for which they might otherwise be eligible—such as both an age pension and an invalid pension or a services pension, or both Austudy and Newstart Allowance or Youth Training Allowance. The logic behind multiple entitlement exclusions would seem to be that applicants should not get two essentially similar types of income support from the Commonwealth through different programs on different grounds.

Since 1991, CDEP participants have been subject to a formal, legislative multiple entitlement exclusion in relation to Newstart Allowance (and for the few years while it existed, from 1991 to 1996, also Job Search Allowance). The multiple entitlement exclusion is at section 614A of the Social Security Act, read in conjunction with the definition of a Commonwealth funded employment program at section 23 (1) of the Act.

Prior to 1991, CDEP was the subject of an administrative agreement which had the same effect in relation to Unemployment Benefit. Basically it was agreed between DSS and the then Department of Aboriginal Affairs (DAA) that an applicant could not receive both CDEP and Unemployment Benefit, or even part Unemployment Benefit, because the two were essentially providing the same sort of income support.

So this is a way in which DSS has treated and does now treat CDEP participants as income-support recipients. They have been excluded from any possibility of being eligible for Newstart Allowance, and formerly Unemployment Benefit, because they have been judged to be receiving an essentially similar income-support entitlement through an alternative Commonwealth program.

What about ways in which DSS treats CDEP participants as employed, low-income wage earners? For pretty well all eligibility purposes other than exclusion from Newstart Allowance, DSS treats CDEP participants as low-income wage earners.

For example, when a CDEP is established in a community, or when individual Newstart Allowance recipients join a CDEP for the first time, DSS cancels the existing Newstart Allowance payments using the cancellation code for 'return to work'. DSS also grants these new CDEP participants Employment Entry Payments, Health Care Cards and family payments on the same basis as others moving into employment (DSS 1994: section 12.290).

While CDEP exists in a community, work within CDEP is treated by DSS as 'suitable employment', which potential applicants for Newstart Allowance should be willing to undertake if it is available. The one concession that DSS makes to the rather different status of CDEP employment is:

Where CDEP wages are less than what the participant's JSA/NSA entitlement would be, the client may withdraw from the program and claim JSA/NSA (DSS 1994: section 12.307).

If participants leave a CDEP other than in the circumstances set out in 12.307, DSS treats them as having left suitable employment, and hence only being eligible for Newstart Allowance if cessation of employment was for 'compelling personal reasons' or if the employment is no longer available.

Hence CDEP is treated by DSS as resembling 'other employment' and CDEP participants as resembling other employees—with only section 12.307 making any concession to the rather different non-market nature of CDEP employment (see DSS 1994: sections 12.300 to 12.308).

If CDEP participants want to apply to DSS for rental allowance, they will, once again, find themselves treated as employed, low-income wage earners, rather than as income-support recipients. They may qualify for rental allowance, if they have an appropriate social security payment (such as family payment) to which the additional payment can be added. But if they don't qualify for another social security payment, as some CDEP participants without children clearly do not, then rental allowance will not be payable.

A similar situation applies in relation to CDEP participants over 60 who may, if they were Newstart recipients, be able to qualify for other additional social security payments, such as telephone allowance or pharmaceutical allowance. However, as CDEP participants, they cannot qualify for any such additional payment because they don't have an appropriate DSS payment to which the additional payment can be added.¹

As a supplementary question, at this point in the discussion, we might ask why it is that DSS treats CDEP participants in the way it does? To answer, we need to break the question in two—corresponding to the two different aspects of DSS's treatment of CDEP participants.

First, why does DSS subject CDEP participants to a legislative multiple entitlement exclusion in relation to Newstart Allowance and why did it formerly, through the administrative agreement with DAA, subject CDEP participants to an effective multiple entitlement exclusion in relation to Unemployment Benefit?

The answer would seem to lie in the CDEP scheme guidelines and, from them, what DSS has understood itself to be dealing with in the CDEP scheme.

The original CDEP guidelines, tabled in the Commonwealth Parliament in May 1977, stated that one of the objectives of the CDEP scheme was:

5. To provide employment opportunities thereby reducing the need for unemployment benefit for unemployed Aboriginals within the community at a cost approximating unemployment benefits.

Later the guidelines went on to say:

11. Grants to individual communities should not exceed the total entitlement of individual members to unemployment benefits

and later still to say that:

14. Each community will be encouraged to establish its own method of remuneration for its members who participate in the project provided that:
 - (a) all unemployed community members, eligible to apply for unemployment benefits will be given the opportunity to participate;
 - (b) each participating community member, provided he contributes the required minimum hours or satisfies other minimum criteria determined by the community, will be guaranteed a minimum income approximating his normal unemployment benefit entitlement (Commonwealth Parliamentary Debates, House of Representatives, 26 May 1977: 1922).

All these aspects of the guidelines and the processes surrounding the establishment of the CDEP scheme led DSS to think of CDEP payments as a direct equivalent and alternative to Unemployment Benefit payments. So DSS felt justified in applying, through the administrative agreement, a multiple entitlement exclusion to CDEP participants in relation to Unemployment Benefit.

Recent ATSIC Guidelines for CDEP keep to the fore this strong sense of equivalence between CDEP and the social security payments that have replaced Unemployment Benefit in recent years; i.e. Newstart Allowance, Job Search

Allowance and also Youth Training Allowance. Hence in 1995 the ATSIC CDEP guidelines began by stating that:

- 1.2.1 CDEP is a community development/employment program for Aboriginal and Torres Strait Islander communities which is funded by the Department of Finance as a partial off-set against unemployment benefit.
- 1.2.2 To participate in CDEP, persons who are entitled to receive, or who actually receive payment of Job Search Allowance (JSA), Newstart Allowance (NSA) or Youth Training Allowance (YTA) elect to forego the DSS allowance and work for wages which are paid from a government grant to the community. This is the basic eligibility criteria and must be read in conjunction with detailed eligibility guidelines at Section 1.4' (ATSIC 1995: Division C, Chapter 1).

So this is why the DSS applies a multiple entitlement exclusion to CDEP in relation to Newstart Allowance and feels quite justified in doing so. And, of course, since 1991, the multiple entitlement exclusion has been written into the Social Security Act.

What about the second part of this why question? Why has DSS for other purposes, beside basic ineligibility for Newstart Allowance and formerly Unemployment Benefit, treated CDEP participants as employed, low-income earners?

I think the answer to this question lies in the very legislatively prescribed nature of the social security system and also the fact that the CDEP was not recognised for many years in the social security legislation—despite being linked to Unemployment Benefit quite explicitly in the administrative CDEP guidelines.

Since CDEP was not referred to in the Social Security Act before 1991, DSS found it difficult to contemplate treating CDEP participants like social security recipients for other eligibility purposes beyond the basic disqualification from Unemployment Benefit. In the absence of such a legislative reference, all that DSS felt it could do was treat CDEP participants as employed, low-income wage earners; which in social security terms is something of a residual category comprising most people 'out there' who are not explicitly defined as part of the social security system.

This treatment of CDEP participants as employed, low-income wage earners could also be justified by DSS, independent of the fact that CDEP participants were not referred to in the Social Security Act. They worked part-time for indigenous community organisations earning wages which were paid for by a government grant. So to all intents and purposes they were indeed employed, low-income wage earners.

So that is how DSS does treat (and has treated) CDEP participants, why it treats them in the way it does, and how it justifies that treatment.

Racial discrimination, administrative 'duplicity'

What about these complaints by CDEP participants in recent years to the Human Rights and Equal Opportunity Commission claiming racial discrimination? Why do these allegations of racial discrimination arise and what do they involve?

The complaints arise largely because when DSS treats CDEP participants as low-income wage earners, as it does for most eligibility purposes, it sometimes treats them a little less favourably than Newstart Allowance recipients. These are not major differences in treatment and may only apply to a fairly small number of CDEP participants. But they are enough to put DSS in the firing line for allegations of racial discrimination.

If I were to paraphrase the line of argument as if I were a CDEP participant making the allegations, it would run something like this.

In the ATSIC guidelines, we, CDEP participants, are identified as the equivalent of Newstart Allowance recipients and you, DSS, apply a multiple entitlement exclusion to us in relation to Newstart Allowance because of that. But then you, DSS, don't treat us, CDEP participants, like Newstart Allowance recipients when we apply to you for rent assistance, telephone allowance, pharmaceutical allowance or health care cards, or when we apply to you for Newstart Allowance having left a CDEP. You treat us instead as employed, low-income earners. Some of us (admittedly probably only a few) who might qualify for these benefits if you treated us the same as Newstart Allowance recipients miss out—and we who are being treated in this way and missing out are all indigenous people, because the CDEP scheme is only open to indigenous people. So this is racial discrimination.

Another reason that allegations of racial discrimination have arisen in recent years has been the abandonment of any attempt within the administration of the CDEP scheme to identify the precise equivalent social security payment to which any individual CDEP participant would be entitled. The CDEP scheme administration has instead adopted an 'average per participant' payment rate approach. There is, in this administrative arrangement between DSS and ATSIC, no guarantee that individual participants will be given the opportunity to earn the equivalent of their would-be social security entitlement. Quite simply, that entitlement is not known, or anywhere calculated in the administration of the CDEP scheme. So it is very easy for individual CDEP participants to perceive that they are not being given the chance to work for the equivalent of their individual social security entitlement. This perception may well be justified. But perhaps more importantly, there is just no way of refuting it, given the current administration of the CDEP scheme via the average per participant rate mechanism.

These allegations of racial discrimination involve technical legal questions which I am not qualified to judge. Also the Racial Discrimination Commissioner

has not yet expressed an opinion on these allegations, let alone a judge in a court case.

What I would say, however, is that irrespective of the technical legal question of racial discrimination, these allegations do point to a worrying duplicity in DSS's treatment of CDEP participants. Here, I use the word 'duplicity' in a fairly weak, non-condemnatory sense, simply to mean 'doing two rather different and inconsistent things at once'. I don't want to judge DSS too harshly here, because as will be seen when we come to the next question of 'how DSS should treat CDEP participants?'—it is difficult to make an answer which is clearly more satisfactory than the present situation.

But the fact remains that DSS is, on the one hand, keeping CDEP participants off Newstart Allowance, and stopping them from possibly qualifying for part Newstart Allowance, by treating them as income-support recipients. And it is at the same time disadvantaging a few CDEP participants in applications for things such as rent assistance, telephone allowance, pharmaceutical allowance and health care cards by treating them as employed, low-income wage earners, rather than the equivalent of Newstart Allowance recipients. DSS is also treating CDEP participants as entering or leaving employment when entering or ceasing to be part of a CDEP; and this too can disadvantage CDEP participants in comparison to Newstart Allowance recipients.

This looks to CDEP participants a bit like they are getting a 'worst of both worlds' treatment from DSS. And even if this does not amount to racial discrimination, it perhaps does not reflect all that favourably on DSS as a high quality administrative organisation—which I generally believe DSS is.

Possible treatments?

So what could DSS do to resolve this problem? How could and should DSS treat CDEP participants in order to avoid allegations of administrative duplicity and inconsistency, or even racial discrimination?

One of the shibboleths of administration is that like cases should be treated in like manner. That principle is never in doubt. But the problem here is that the CDEP scheme is a unique arrangement within Australian social policy—and so the question becomes which are the other DSS cases which CDEP participants are most like and should therefore be treated most like?

At present DSS treats CDEP participants as low-income employed people for some purposes and income-support recipients for other purposes. Clearly one way to avoid these allegations of administrative duplicity and inconsistency, if not racial discrimination, would be simply to say from now on, for all administrative purposes DSS will treat CDEP participants either totally as low-income employed people or, alternatively, totally as income-support recipients.

Jumping clearly one way or the other would certainly get rid of the allegations, but I'm not sure which of them would be the right way to jump in relation to the good health and welfare of the CDEP scheme—which has after all proven very popular with indigenous people and communities.

This is where I believe ATSIC needs to take more of an interest in DSS's administrative problem and to help DSS work through the problem in a way which will be beneficial, rather than destructive, to the CDEP scheme.

If, for example, DSS were to say, from now on it will treat CDEP participants totally as employed, low-income wage earners, then what might happen as a consequence of this? First the multiple entitlement exclusion in the DSS Act would need to be removed and then some CDEP participants—probably just a few who could show that their work on CDEP was very casual and they were effectively still unemployed—might start to qualify for part Newstart Allowance as well as CDEP.

But then ATSIC would no longer be able to say that CDEP was an alternative to Newstart Allowance—and this may somewhat change the understanding which currently exists between ATSIC and the Department of Finance and Administration over CDEP funding. That Department may no longer be quite so willing to fund the CDEP scheme in the extensive and expanding way that it has, if it no longer saw a clear offset of CDEP against Newstart Allowance.

From the participating CDEP communities, ATSIC may well face pressure for CDEP wages no longer to reflect Newstart Allowance payment levels, but rather to be tied to industrial awards and employment contracts.

So as a consequence of DSS treating CDEP participants totally as employed, low-income earners, the CDEP scheme may start to change quite considerably towards a straight employment program, not linked at all to Newstart Allowance. Does ATSIC really want that?—with its possible implications for a change in its relationships with the Department of Finance and Administration and participating CDEP communities. Do Aboriginal and Torres Strait Islander people and communities want such a change to the CDEP scheme?

Alternatively, DSS could say that from now on it will treat CDEP participants totally as income-support recipients. It will pay rent assistance, telephone assistance and pharmaceutical assistance to those few CDEP participants who presently seem to be missing out because of their treatment as employed, low-income wage earners, and it will give them health care concession cards on the same basis as other Newstart Allowance recipients. When they enter or leave a CDEP, it will not treat them as entering or leaving employment, but rather as transferring between two forms of Commonwealth funded income support. But this alternative, too, may have some consequences for the CDEP scheme and its participants which may not be fully intended or greatly appreciated.

For example, it would probably mean that there would need to be a move away from the average per participant rate administration of the CDEP scheme

towards a more precise identification of individual participant's notional social security entitlement. This would in turn raise significant issues of administrative capacity. When DAA tried to adopt such a precise individualised administration of the CDEP scheme between 1986 and 1991, it laboured mightily under the weight of the administrative task—and eventually switched to the average per participant rate arrangements as a way out of the task. Perhaps only an organisation like DSS or the new Centrelink could undertake such an extensive, individualised, rule-bound administrative task. And this would mean significant changes in the current division of labour between ATSIC and DSS surrounding CDEP. Do ATSIC and CDEP communities want this?

Another example of unintended consequences arising from thorough-going treatment of CDEP participants as income-support recipients relates to the fact that at present CDEP participants, under the ATSIC guidelines, face a considerably more generous additional income test than do Newstart Allowance recipients. Whereas Newstart Allowance recipients start to lose their income-support payment gradually when they earn above \$60 per week additional income, a CDEP recipient can earn three, or possibly even four times the remote per participant rate of \$170 per week without losing eligibility for CDEP.

The 1995 ATSIC CDEP Guidelines stated that:

- 1.4.7.1 Each CDEP participant, can only earn a maximum gross weekly income of twice the weekly remote per participant rate from the CDEP Wage component of the ATSIC grant.
- 1.4.8.1 Each CDEP participant can earn a maximum gross weekly income of twice the weekly remote per participant rate from permanent part-time work from sources other than CDEP wage component funds before becoming ineligible for CDEP. Other sources include income earned from CDEP Recurrent component of the ATSIC grant funds (ATSIC 1995: Division C, Chapter 1).

Further to this, recent data from the 1994 National Aboriginal and Torres Strait Islander Survey (NATSIS) seems to suggest that CDEP participants are indeed in many cases earning more than the average per participant rate of \$170 per week—which is roughly \$8,800 per annum.

Table 1 organises the NATSIS data by three labour force categories—those who declared themselves to be unemployed, those who declared themselves to be employed in CDEP and those employed other than in CDEP. It shows that many of those who declared their labour force status as CDEP employed earned well above \$8,800. (Some also, however, earned less.) But perhaps more importantly, Table 1 shows that CDEP-employed people earned consistently more than those who declared their labour force status as unemployed. It seems that the whole income distribution of CDEP participants is one income group higher than those who are unemployed. So CDEP does seem to be a way in which indigenous people can attain a little more income a little more easily than is the case for those who are unemployed.

Table 1. Income distribution of indigenous people aged 15-64 years, by labour force status

Income \$ per annum		Labour force status		
		Unemployed	CDEP employed	Other employed
0-3,000		12.2	0.2	0.9
3,000-8,000		44.2	25.7	4.3
8,000-12,000		20.8	29.5	8.5
12,000-16,000	Per cent	16.4	17.2	8.8
16,000-20,000	Distribution	3.7	16.4	13.9
20,000-25,000		2.2	6.0	23.0
25,000-30,000		0.4	3.1	18.0
30,000-35,000		0.1	1.2	9.7
35,000-40,000			0.1	5.6
40,000+			0.5	7.4
		100.0	100.0	100.0
	Number	39,748	16,364	46,575
Mean income		\$8,290	\$12,641	\$24,128
Median income		\$7,278	\$11,271	\$22,971

Source: NATSIS unit record file

If the cost of being treated totally like Newstart Allowance recipients by the DSS were to be the imposition of a stricter additional income test on CDEP participants, like the one faced by Newstart Allowance recipients, (and the Department of Finance and Administration hinted two years ago that this might be a possibility), then it would hardly be worthwhile. A few social security eligibility gains for a few CDEP participants would probably be far more than offset by lost additional income possibilities.

The right answer to this administrative conundrum does not necessarily lie in DSS starting to treat CDEP participants totally like Newstart Allowance recipients, or totally like employed, low-income earners.

It may be that in the end a middle ground treatment, though not perhaps DSS's current middle ground treatment, is the most beneficial and justifiable one for CDEP participants.

One new development of some relevance here may be the present Government's work-for-the-dole scheme. Here is a new category of people who are working while on income security payments, and with whom CDEP participants could justifiably be compared.² DSS is treating work-for-the-dole participants largely as income-support recipients who just happen to do some work, rather than as employed low-income earners. If the treatment of CDEP participants was to move in this in this direction, ATSIC would probably want to negotiate some retention of its more generous additional income test for CDEP with the government—since work-for-the-dole does not have this. And if successful, this would mean that even the comparison with work-for-the-dole participants would

not be precise. CDEP participants would still be uniquely treated in some middle ground way—not quite the same as any other group.

Conclusion

In conclusion, I would simply say that far more discussion is needed about these administrative issues between ATSIC and DSS than has been occurring up to now—and a good bit more thinking ahead has to be done as to what might be some of the possible consequences of changing current DSS practices in one direction or another. I think ATSIC two or three years ago threw its weight behind these allegations of racial discrimination in the treatment of CDEP participants in comparison to Newstart Allowance recipients without really understanding the implications. ATSIC believed, somewhat naively, that this was a relatively simple matter which could be simply fixed by DSS if only it had the will. But it is far from a simple matter, and a change in treatment of CDEP participants may have as many ramifications for ATSIC as it does for DSS.

There has been, and still is, an enormous need for communication and building of understanding between these two very different organisations with very different administrative cultures. Those understandings have not developed far enough yet for it to be clear which way to move with the treatment of CDEP participants—however, the discussions have progressed significantly in the last two years and hopefully they will continue to do so in the near future.

Notes

1. It was put to me after the seminar, that the sorts of exclusion detailed in these last two paragraphs do not represent treatment of CDEP participants as people in employment, but rather flow from the multiple entitlement exclusion: that is, the additional payments are part of the Newstart Allowance from which CDEP participants are excluded by 614A. This argument has some merit, but it is rather weakened by the fact that CDEP participants with children can access rent assistance through family payments. This suggests that rent assistance, at least, among additional payments, is a separate entitlement and not just a supplementary part of any one other social security payment.

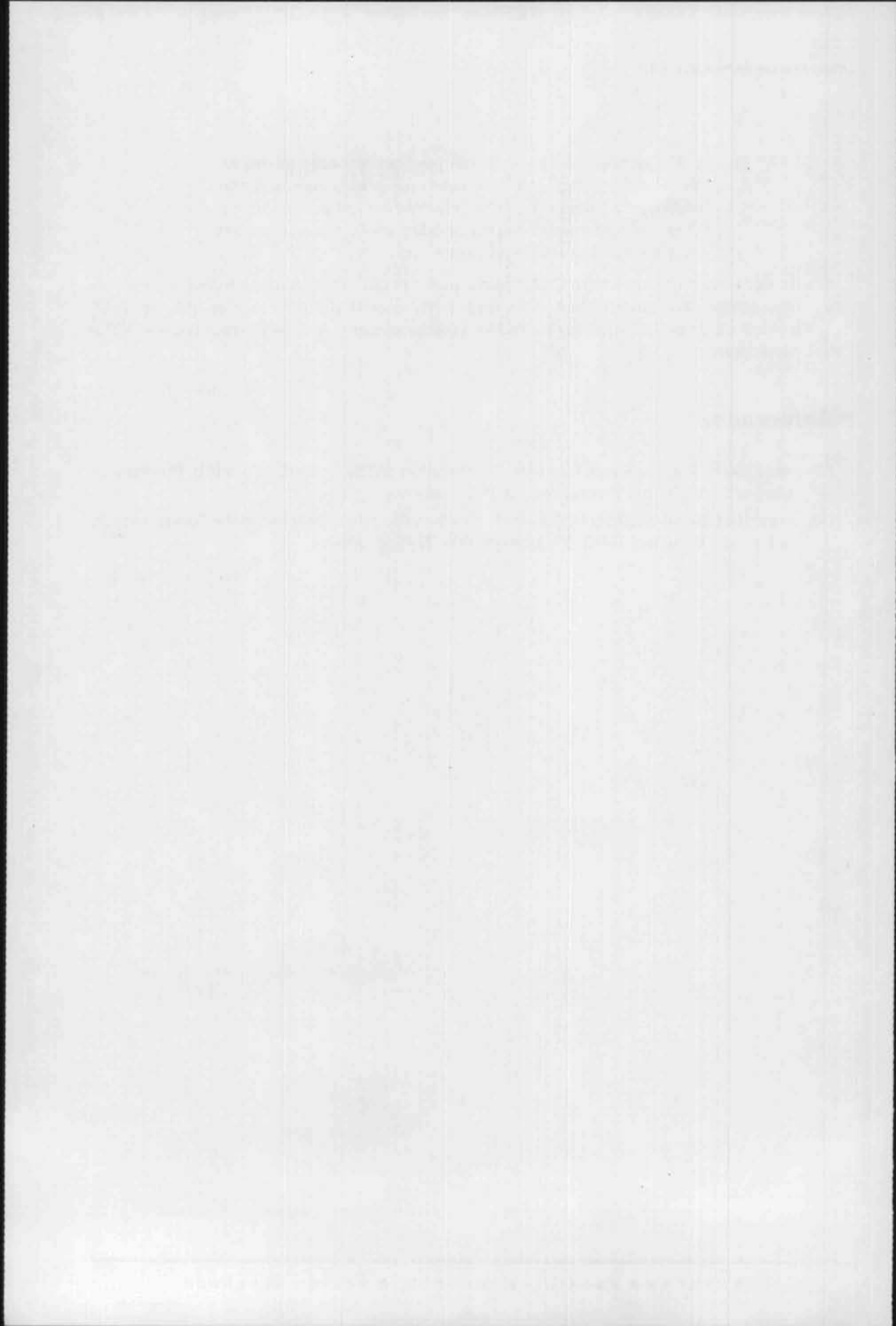
The point here is not that the employment status of CDEP participants is itself relevant to eligibility for these additional payments, but rather that in treating CDEP participants in the way it does when they apply for these additional payments, DSS is treating them just like it would any other employed wage earner. DSS's response to the Race Discrimination Commissioner of the Human Rights and Equal Opportunity Commission on these matters, dated 16 June 1995, makes this clear. Referring to rent assistance as RA, it stated:

CDEP participants who are family payment recipients receive RA on the same basis as all other family payment recipients. CDEP participants without dependent children are not entitled to RA. They are in the same position as other low-income earners not receiving a DSS pension or allowance.

2. An earlier group with whom CDEP participants could have been compared, were those who participated in the Landcare and Environment Action Program (LEAP). DSS treated LEAP participants far more like income security recipients than it does CDEP participants.

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